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NO. 179

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

GENERAL OUTDOOR ADVERTISING CO., INC.,
Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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No.

GENERAL OUTDOOR ADVERTISING CO., INC.,
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UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Claims in this case.

OPINION BELOW

The opinion of the United States Court of Claims (Appendix, infra. p. 1-a) is reported in 169 F. Supp. 947.

JURISDICTION

The judgment of the United States Court of Claims was entered on February 11, 1959 (Appendix, infra., pages 12-a, 13-a. A timely petition for reconsideration was denied on April 8, 1959. A petition for rehearing (in part) on the merits of the earlier decision of March 6, 1957 was filed and was denied on April 29, 1959. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1255.

QUESTIONS PRESENTED

1. Whether the two-year limitation period provided in Section 322(b)(1) of the 1939 Internal Revenue Code begins to run with respect to an amount of money deposited on account with a Collector before the full tax assessed, with respect to which the amount was deposited, has been paid, which in this case was on September 2, 1948.

2. Whether a waiver of a 90-day notice of deficiency is equivalent to a waiver of the restrictions (provided in subsection (a) of Section 272 of the 1939 Internal Revenue Code) on the assessment and collection of a deficiency (as provided in Section 272(d) of that code).

3. Whether a statement made by a taxpayer that it does not desire to protest before a Revenue Agent in charge a part of a proposed deficiency in tax and a remittance on account to the Collector of an amount which is less than the part of the proposed deficiency not protested are equivalent to a waiver (as provided in Section 272(d) of the 1939 Internal Revenue Code) of the restrictions on the assessment and collection of the amount so remitted.

4. Whether a payment on account in respect of a deficiency in tax, subject to final determination, under the provisions of the Internal Revenue Code of 1939, (excepting Section 272(d)) may be legally assessed as a tax?

5. Whether the issuance of a 90-day notice of deficiency (provided for in Section 272(a)(1) of the 1939 Internal Revenue Code) is essential to the validity of an assessment of Federal income and excess profits taxes where, prior to assessment, the taxpayer has filed with the Commissioner, a waiver under Section 272(d).

STATUTES INVOLVED

The statutory provisions involved are Internal Revenue Code of 1939, Sec. 322(b)(1) (26 U.S.C. 1952 ed., Sec. 322(b)(1)); Sec. 272(a)(1) (26 U.S.C. 1952 ed., Sec. 272(a)(1)); Sec. 272(d) (26 U.S.C. 1952 ed., Sec. 272(d))—which appear in the Appendix, infra., pages 14, 15-a.

STATEMENT

On March 6, 1957, the court below entered judgment in favor of taxpayer calling for a determination of the amounts recoverable for 1944 and 1945 under its Rule 38(c). This decision is reported in 137 Ct. Cls. 607, 149 F. Supp. 163. The court held that taxpayer, for the year 1944 was limited in its recovery to amounts of tax paid within the two-year period prior to April 3, 1950, the date when a claim for refund on the merits was filed. In this proceeding under its Rule 38(c) the court entered judgment on February 11, 1959, reported at 169 F. Supp. 947 for recovery by taxpayer of $108,681.88 with interest as provided by law. It held the net overpayment of tax for 1945 to be $48,221.41 and for 1944 to be $60,460.47. The amount for 1944 is in contest. Taxpayer contends the amount should be $199,322.21.

The essential facts as found by the court below (Appendix, infra., p. 7-a), are summarized, as follows:

Under date of July 23, 1947 the Revenue Agent in Charge at Chicago sent taxpayer a notification of a proposed deficiency in excess profits tax for 1944 of $419,193.64 and an overassessment of income tax of $102,816.60, based on a revenue agent's report dated May 26, 1947. Enclosed with the letter was a U. S. Treasury Form 874 calling for the execution of a Section 272(d) waiver and agreement to the overassessment or the filing of a Protest if it did

not agree. Taxpayer did not execute the waiver. It filed a Protest of the tax within the required period, on August 19, 1947. It advised the Agent by a copy of a letter to the Collector dated August 14, 1947 that it would protest the findings of the revenue agent "within the allotted time." It did so. With this letter it enclosed a check for $225,000 as a part payment of a net tax deficiency it expected to be redetermined as a favorable result of its protest. It also sent back a form of acknowledgment of a copy of the agent's report, headed "Receipt of Revenue Agent's Report," which it signed. (R. Def. Ex. 3) The net deficiency proposed was $316,377.04. The letter of July 23, 1947 stated that if was "not a final notice of deficiency." At no time thereafter did the Agent or the Commissioner ever send taxpayer a "final notice of deficiency" as provided for in Section 272(a)(1). It was assumed that taxpayer, by paying the $225,000, was paying the unprotested part of the proposed deficiency, and this amount was assessed as a tax on October 10, 1947, without notice to taxpayer until April 19, 1948. As a result of a redetermination under its protest, the unprotested part of the proposed deficiency was determined to be $308,493.20. The net deficiency in tax of $316,377.04 was reduced to $249,576.01. The adjusted deficiency was not determined until about April 22, 1948, at which time taxpayer did sign a Section 272(a) waiver of the restrictions on the assessment and collection of an excess profits tax deficiency for 1944 in the effective amount of $308,493.20. Prior thereto, the Collector had transferred from his 9-D, Unclassified Collection Account, on November 14, 1947, the $225,000, as a payment of tax assessed. In pursuance of the waiver of April 22, 1948, the Collector assessed only the balance of $83,493.20 on August 13, 1948.

Final payment of the deficiency in excess profits tax and interest for 1944, was not made until September 2, 1948 as appears from the record. The sum of $83,493.20, together with interest, has been considered by the court below as a payment of tax made within the two-year period for recovery.

With taxpayer's letter of August 14, 1947 there was also enclosed three checks in addition to that for $225,000; one for $33,750 as interest on that sum to August 15, 1947; and, checks for the payment on account of an expected future deficiency in excess profits tax for 1945, in the amount of $150,000 with interest to August 15, 1947, of $13,500. Contrary to the Commissioner's treatment of the deposit of $225,000 for 1944, the advance payments for 1945 were not assessed until a final determination of the excess profits tax on December 10, 1948, when $341,767.06 was assessed. The advance payments were held in the Collector's 9-D account until January 17, 1949, and then transferred as a payment of tax and interest.

REASONS FOR GRANTING THE WRIT

I

The Effect of Walter W. Flora v. United States, No. 492, 357 U.S. 63, Rehearing Granted, June 22, 1959

The court below has held that the sum of $225,000 remitted to the Collector on August 14, 1957, became a payment of tax no later than November 14, 1947 when the Collector applied it to an assessment recorded October 10, 1947. Consequently, the court held that recovery of that amount under the claims for refund filed April 3, 1950, was

barred by Section 322(b)(1) of the 1939 Internal Revenue Code. That section requires the filing of a claim for refund within two years "from the time the tax was paid." In effect, therefore, the court below has held that the term "tax" as used in Section 322(b)(1) includes a partial payment of an asserted tax deficiency. It is submitted that such a position stands in direct opposition to the principles announced by this Court in *Flora* v. *U.S.*, 357 U.S. 63 (1958), rehearing granted June 22, 1959.

In that case, resolving a conflict between the decisions of the Eighth and Tenth Circuits, this Court held that a complaint for refund of income taxes under 28 U.S.C. § 1346 (a)(1) fails to state a claim upon which relief can be granted unless the full amount of the assessed deficiency has been paid. Although the question raised here was not directly involved in *Flora*, the reasoning of the Court in that case is directly in point.

The Court, in *Flora*, stated that the words "tax," "penalty" and "sum" should be given the same meaning in the jurisdictional provision (28 U.S.C. § 1346(a)(1)) as in the "claim-for-refund" statute (1939 Internal Revenue Code Section 3772(a)(1), now § 7422(a) of the 1954 code). This latter statute requires, as a condition precedent to a suit for refund, the filing with the Commissioner of a claim for refund or credit "according to the provisions of law in that regard, and the regulations . . . established in pursuance thereof." Section 322(b)(1) is one of the "provisions of law in that regard," and is an integral part of the general statutory scheme regulating the recovery of overpayments of tax. The word "tax," as used therein, should therefore be given the same meaning as it has in the jurisdictional and "claim-for-refund" provisions, viz: the full tax claimed to be due for the year in question. Such an interpretation

would allow the filing of a claim for refund within two years from the time the tax was paid in full.[1]

Although the conditions precedent to filing a claim for refund with the Commissioner were not directly involved in *Flora*, the Court in its opinion there (Note 10) quoted with approval from *Kings County Savings Institution* v. *Blair*, 116 U.S. 200, 205 (1885): "No claim for the refunding of taxes can be made according to law and the regulations until after the taxes have been paid [and] . . . no suit can be maintained for taxes illegally collected unless a claim therefor has been made within the time prescribed by the law."[2] The relation between the full payment requirement and the time for filing claims for refund has been thus recognized by this Court.

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1. "Section 3772—Suits for Refund

(a) Limitations—

(1) Claim. No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof."

2. It should be noted that in the case at bar, as in most cases in which a partial payment is made, the amount of part payment is not determined by any particular findings of the Revenue Agent, but rather by considerations wholly independent of any questions involving the correctness of the deficiency proposed or assessed. For this reason, it was impossible to file a claim for refund of the partial payment which will conform to the Regulations. Treasury Regulations 11, Sec. 29.322-3 provide: "The claim (for refund) must be set forth in detail and under oath each ground upon which a refund is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof." In the case at bar, the first date on which it was possible to do this was on April 22, 1948, when, as a result of the protest filed, the preliminary findings of the revenue agent were revised and the deficiency in excess profits tax was finally determined and agreed to.

The result of the Court's holding in *Flora* is to require as a condition precedent to a suit for recovery, the filing with the Commissioner of a claim for refund only after the "full tax" assessed for a given period has been paid. A claim for refund of a partial payment in respect of a tax is unsupportable as a claim.

The "claims for credit or refund" required by Section 322(b)(1) must refer to an effective claim, and it is submitted that the "tax" referred to must be a recoverable "tax," which, under *Flora*, is nothing less than the full tax due. The $225,000 partial payment here was not a recoverable "tax." Therefore, it was not a payment of "tax" on which the statute of limitations began to run until September 2, 1948.

The Court of Claims has made a clearly erroneous interpretation of the Statute, and since the deficiency in excess profits tax for 1944 was not paid in full until September 2, 1948, which is within 2 years of the filing of the claim for refund of April 3, 1950, the full amount of the net overpayment of excess profits tax for 1944 paid as a deficiency is recoverable. The original tax plus the deficiency in tax was the "full tax" for 1944.

The foregoing reasoning is based on the assumption that this Court's original decision of June 16, 1958 in *Flora* correctly states the law and will not be reversed on rehearing. The application of *Flora* is of undoubted general importance in the future administration of the revenue laws.

II

The Decision Below is in Conflict with the "Ninth Circuit Rule" on Validity of Waivers of the Provisions of Section 272 (a) (1) of the 1939 Internal Revenue Code.

Question 5 as herein presented, is now before this Court on petition for a writ of certiorari to the Ninth Circuit Court of Appeals granted in the case of *The United States* v. *Sydelle Price*, No. 809. In that case, certiorari was

granted on the basis of a conflict of authorities and the importance of deciding a question that was estimated to affect taxpayers numbering 900,000 with active delinquent accounts arising under the 1939 Code. Petitioner's position is the same as *Price*. In *Price* the United States brought action to collect an asserted unpaid balance of federal income taxes. One of Mrs. Price's defenses was that since no notice of deficiency had been issued the suit was prohibited by statute. The government contended that she had waived this requirement. It was her position, however, that this requirement may not be waived, and that her purported waiver was therefore ineffective for this purpose. Mrs. Price executed a regular U. S. Treasury Form 870 waiver of the restrictions provided in Section 272(a) of the Code in the amount of $9,965.48 for 1946 on August 18, 1949. On October 14, 1949, the Commissioner assessed against her, for that year, the above sum, plus interest of $1,498.09, or a total of $11,463.57. On December 16, 1949, the Commissioner issued her a 90-day letter asserting deficiencies for penalties in amounts of $2,491.37 and $498.27. No deficiency in income tax was asserted against her in this letter, nor in any other such letter. On January 12, 1950, Mrs. Price paid $1,500 on account for 1946. The remainder of unpaid tax $9,963.57 was the subject of the suit. The purported waiver signed by Mrs. Price recited that it was made pursuant to Sec. 272(d). The Ninth Circuit affirmed a judgment in favor of Mrs. Price. 263 F. 2nd 382. In *Mutual Lumber Co.* v. *Poe*, 9 Cir., 66 Fed. 2nd 904, (1933), it was held that a waiver prior to the mailing of a notice of deficiency is premature and invalid, and that as the notice gave the taxpayer the right of petition to the Tax Court, there was nothing to waive until such a notice had been mailed. The holding in *Mutual* was reaffirmed by the Ninth Circuit in *McCarthy* v. *Commissioner*, 80 Fed. 2nd 618, decided in 1935, and followed

in *East Bay Water Co.* v. *McLaughlin*, D.C.N.D. Cal., 24 Fed. Supp. 222, decided in 1938. The Court of Appeals in *Price* said the basic question common to all three cases was the same—was the waiver valid when filed prior to the mailing of a notice of deficiency? The Court of Appeals again reaffirmed its position that the waiver was invalid.

Accordingly, petitioner in the instant case contends that if it be held that it executed a Sec. 272(d) waiver of the $225,000 prior to assessment, it was entitled nevertheless to receive a final notice of deficiency covering same which would have suspended the assessment and collection of the tax. Such a notice was not sent at any time. As a notice in this case could not have been mailed absent a final determination until sometime about April 22, 1948, the Commissioner was barred from making the assessment of October 10, 1947. A waiver in petitioner's case would be invalid, as the waiver provisions do not come into play until there is a determination by the Commissioner, and none was made in this case until after April 3, 1948 (when the Court below said the statute of limitations for the said two-year period for recovery began to run).

With regard to the conflict of authorities the Government petition in *Price* pointed out "the long-standing administration practice not to send deficiency notices if a waiver had already been filed by the taxpayer, citing *Associated Mutuals* v. *Delaney*, 176 F. 2nd 179, 183 (C.A. 1st). It said *Price* and the other cases in the Ninth Circuit also conflicted with *Moore* v. *Cleveland Ry. Co.*, 108 F. 2nd 656 (C.A. 6th), which is said to be the fountain-head of the view that waivers filed prior to issuance of a notice of deficiency are valid.

It is respectfully submitted that the position taken by the respondent in *Sydelle Price*, in furtherance of the "Ninth Circuit rule" is the better view on the question presented

under Question No. 5 herein, the answer to which is in the affirmative. In support of this statement and as reference material, petitioner here has included in the Apendix, infra, at pages 16-a–24-a, a statement of the Legislative History of Section 272(d), Internal Revenue Code of 1939 as it appears in the brief in opposition to the petition filed in *Price*.

III

The "Waiver". Questions Presented

Question No. 2. The language of the court below in its opinion indicates that the taxpayer, before the October 10, 1947 assessment of $225,000, waived its right to receive a 90-day notice of deficiency based on a determination of tax in that amount, which notice and determination of tax is required by the provisions of Section 272(a)(1) of the 1939 Internal Revenue Code. The court held that such a waiver of notice justified the Commissioner in making the assessment of October 10, 1947. The court did not specifically decide (although the issue was raised by the pleadings) that the taxpayer had, pursuant to Section 272(d), waived the restrictions on the assessment and collection of $225,000 as a tax. To justify such assessment, taxpayer must have signed a specific waiver of the restrictions on the assessment and collection of such amount as a tax, or there is no waiver of any of the restrictions provided by Section 272(a)(1) of that Code. Compliance with the provisions of Section 272(d) must be unequivocal and was essential to validate the assessment of October 10, 1947. Section 272(d) is the only exception to subsection (a)(1) of that section. (See the Legislative History of Section 272 (d), as directly related to Question 5 hereof. Appendix infra, pp. 16-a to 24-a.) Accordingly, the answer to Question 2 is in the negative.

Question No. 3. At the time that taxpayer sent its letter of August 14, 1947 with the remittance of $225,000, and notified the Agent that it would file a Protest against the proposed deficiency by sending him a copy of the remittance letter, and marking the Form of "Receipt for Revenue Agent's Report," there was no way that the amount of "part of the proposed deficiency not protested" could have been determined until after the questions raised in the Protest had been favorably decided for the taxpayer. This involved a process which took one of the questions to the Bureau in Washington to decide. A new question was raised during processing of the Protest. It was not until about April 22, 1948 that the Agent made a determination of the amount of "the part of the proposed deficiency not protested." The determination of the adjusted deficiency of $308,493.20 on the above date proved to be the amount thereof that it did not intend to protest. This was verified by the further fact that on April 22, 1948, taxpayer signed a Section 272(d) waiver. It also verifies the fact that $225,000 deposited with the Collector conditioned on the adjustments to be made was but a part of the sum not protested. The original deficiency proposed was $419,193.64, and the net deficiency was $316,377.04. The latter was reduced to $249,576.01. In face of the Protest, it would have been impossible to make a determination of a definite amount which must be included in a final notice of deficiency. A holding to the contrary would be in direct conflict with *Mutual Lumber Co.* v. *Poe*, supra, in which the Ninth Circuit said, on p. 907:

> ". . . If there is no *determination* of a deficiency by the Commissioner, there is no right of appeal to waive; for the provisional report of an internal revenue agent cannot be made the basis of an appeal." (Emphasis supplied.)

A final notice of deficiency required by Section 272(a)(1) must define items of adjustment which may form the basis of issues raised in a petition to the Tax Court, and the exact amount of the deficiency in tax arrived at must be asserted. Consequently, in view of these facts and circumstances, how could the lower court legally conclude that taxpayer had waived a notice of deficiency required, which could not be prepared? Accordingly, the answer to Question 3 as presented, is in the negative.

IV

The answer to Question 4 is in the negative. This is supported by the decision of the court below. It ignored the Government's contention that the $225,000 was assessable as a voluntary payment of tax. The answer is also supported by a provision, new in the 1954 Code. Under Section 6213(b)(3) of that Code, any amount so paid can be assessed notwithstanding the provisions of subsection (a) of Section 6213 of which Section 272(a)(1) is the statutory prototype.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

OPINIONS AND FINDINGS

in the

UNITED STATES COURT OF CLAIMS

No. 270-52

(Decided February 12, 1959)

General Outdoor Advertising Co., Inc.

v. *United States*

WHITAKER, *Judge*, delivered the opinion of the court:

This controversy arose under this court's Rule 38(c), concerning the amount of tax which plaintiff is entitled to recover under our previous decision in this case, reported in 137 C. Cls. 607. In that opinion we held that the Commissioner of Internal Revenue had erroneously reduced the value of plaintiff's land and buildings. However, we also held that the claim for refund based upon this erroneous valuation was not an amendment of the original claim, but rather an independent claim, from which it follows that plaintiff can only recover the payments of tax made within two years prior to the date it was filed, which was April 3, 1950. Section 322(b) of the Internal Revenue Code of 1939 permits recovery if "the tax was paid" within two years of the filing of the claim for refund.

The question presented is the date a remittance of $225,000 and interest by the taxpayer in August 1947 shall be credited as a tax payment on account of the taxpayer's liability for additional taxes for 1944. This remittance was made prior to any assessment or a notice of a deficiency from the Commissioner on account of such liability, but after receipt of the revenue agent's report recommending the assessment of a larger deficiency.

The Government says this was a voluntary payment by

the taxpayer of an amount of additional tax which it admitted it owed for that year, and must be considered as the payment, in August 1947, of taxes due for 1944, although no assessment of additional taxes had been made at that time.

The plaintiff, on the other hand, says that the remittance in 1947 was merely "on account", or a deposit, in anticipation of an assessment, to take care of one when made, and that the subsequent assessment in October 1947 was of no effect, because: (1) the plaintiff was not given a deficiency notice ninety days before the assessment, as provided by section 272(a)(1) of the Internal Revenue Code of 1939; and (2) because the assessment list was not signed by the Commissioner personally, but by an agent, who, under authority from the Commissioner, had signed the Commissioner's name thereto. Hence, it says the assessment was void, from which it follows there was no assessment to which the remittance of $225,000 could be applied, and that it could not lawfully be applied in part settlement of plaintiff's tax liability for 1944 until the amount of that liability had been determined. That determination was in 1948, within two years of the filing of the claim for refund.

In May 1947 an internal revenue agent examined plaintiff's tax returns for the years 1941, 1942, 1943, and 1944. For the year 1944, the only year involved here, the agent's report showed a net deficiency in excess profit tax of $316,377.04. A copy of this report was furnished plaintiff with a letter dated July 23, 1947, which enclosed a form for "waiver and acceptance" and one for acknowledgment of receipt of the report with an expression of the taxpayer's position with respect to it, but the letter stated that this was "not a final notice of deficiency."

Plaintiff did not execute the form for waiver and acceptance, but it did execute the form headed "Receipt of

Revenue Agent's Report." This form first acknowledged receipt of the report, and then read:

> The position of the undersigned with respect to the disposition of the findings disclosed by the report is indicated by a check mark:
>
> 1. Revenue Agent's findings are agreed to..... ☐
>
> (a) Signed Agreement Form 874 is enclosed herewith ..... ☐
>
> (b) Signed Agreement Form 874 has already been forwarded to your office..... ☐
>
> (c) Payment of any deficiency in tax indicated above has already been made to Collector of Internal Revenue (in part —not protested) ..... ☒
>
> (d) Payment of any deficiency in tax indicated above will be made to the Collector of Internal Revenue upon receipt of notice and demand, and no objection will be made to the immediate assessment of the tax..... ☐
>
> 2. Revenue Agent's findings are not agreed to... ☒
>
> 3. Protest will be filed within the alloted time... ☒
>
> 4. I do not intend to protest these findings..... ☐

By this the taxpayer said it did not agree with the agent's report in full, and that it meant to file a protest, but not to the report in its entirety, but only in part, and that it was enclosing check in part payment.

The document was enclosed in a letter of the same date, which read in part:

> * * * Part of the net tax will be made the subject of a Protest to be filed with the agent in charge.
>
> It is our purpose hereby to stop the further running of interest on the net tax deficiency for 1944 by mak-

ing a payment on account of so many dollars in principal of tax and so many dollars of interest on such tax. Therefore, find enclosed herewith a check payable to your order in the sum of $225,000.00 to apply on the tax principal and another check payable to your order for $33,750.00 to apply on interest accrued on the tax deficiency for this year.

Enclosed also were two checks, one for $225,000 on account of the 1944 tax deficiency, and the other for $33,750 as accrued interest.

Upon receipt of these checks, the collector charged them to its 9-D unclassified collection account, since at that time there was no unpaid assessment for 1944 against plaintiff to which the payment could be credited. About two months later, on October 10, 1947, without the plaintiff's knowledge, an assessment for the year 1944 of $225,000 as excess profits tax and $32,625 as interest, computed to August 15, 1947, was duly certified under the signature of Commissioner Schoeneman. The list was in fact signed by an employee in the office of the Commissioner, who had been previously authorized in writing by Mr. Schoeneman to sign Mr. Schoeneman's name to such lists. About a month after the assessment, on November 14, 1947, the sums were transferred by the collector from his 9-D account and credited against the assessment of October 10, 1947. This was more than two years before the claim for refund was filed.

A refund of $1,125.00, as an overpayment of this assessment, was the first actual notice plaintiff had of this assessment. This was in April 1948.

Plaintiff first contends that the October 10 assessment was invalid, because notice of the proposed assessment was not given, as provided by section 272(a)(1), *supra*. That section provides as follows:

> *Petition to the Tax Court of the United States.*—If in the case of any taxpayer, the Commissioner deter-

> mines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day) the taxpayer may file a petition with the Tax Court of the United States for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 3653(a) the making of such assessment or the beginning of such a proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. * * *

The purpose of this section is to allow a taxpayer to contest in the Tax Court a deficiency in tax which the Commissioner has found to be due, prior to payment. But, if the taxpayer states that he does not care to contest it, of course the notice need not be sent, since it is sent only to permit a contest in the Tax Court, and the assessment may be made forthwith. Here the taxpayer stated it meant to protest the action proposed by the revenue agent only in part, and sent its check for $225,000 in part payment of the asserted liability of $316,377.04. Five days later, it filed its protest against two alleged errors of the revenue agent. Thus, by its statement that it meant to protest the payment only in part, and by its payment of the amount of $225,000 on account of the proposed deficiency, the taxpayer admitted liability for $225,000 of the proposed deficiency.

In such circumstances the Commissioner of Internal Revenue was justified in making the assessment of the $225,000

and in satisfying it with plaintiff's remittance of that amount. As to that amount plaintiff waived the notice required by section 272(a)(1). Cf. *Lehigh Portland Cement Co.* v. *United States*, 90 C. Cls. 36.

The plaintiff's second contention is that the assessment is void because the Commissioner did not sign it personally. There is no statutory requirement that he do so. Section 3901(a)(1) provides that the Commissioner of Internal Revenue shall have "general superintendence" of the assessment and collection of all taxes. 26 U.S.C. § 3901 (1952 ed.). Anyone at all acquainted with the magnitude of the task of making assessments of internal revenue taxes knows that Congress by the use of the words "general superintendence" did not intend the Commissioner to act personally on all collections and assessments. All assessments are made in his name, but he does not make them himself, but through subordinates. Nor need he himself sign the assessment lists, of which there are many, many thousands. As the trial commissioner points out in finding 4, if the Commissioner of Internal Revenue was required to sign such documents personally, he would have but little, if any, time for his other duties. Such signing may be done by the Commissioner personally, or his name may be subscribed by another under his direction. See *Christopher* v. *Commissioner*, 55 F. 2d 530.

It follows, therefore, that the October 10, 1947, assessment and the subsequent application thereto of the remittance of $225,000 were valid, and the April 3, 1950, refund claim as to that amount is barred by the two-year statute of limitations.

However, the refund claim is valid as to the 1944 and 1945 taxes which were assessed and paid after April 3, 1948. On this account plaintiff is entitled to recover a net overpayment for 1944 of $60,460.47; and a net overpayment for

1945 of $48,221.41. Judgment shall be entered for $108,681.88, with interest as provided by law.

It is so ordered.

REED, *Justice (Ret.)*, sitting by designation; LARAMORE, *Judge*, MADDEN, *Judge*, and JONES, *Chief Judge*, concur.

FINDINGS OF FACT.

The court, having considered the evidence, the report of Commissioner George H. Foster, and the briefs and argument of counsel, makes findings of fact as follows:

1. Under date of May 26, 1947, a revenue agent made an examination of plaintiff's returns for the years 1941, 1942, 1943, and 1944. A copy of the report was furnished plaintiff by the agent with a letter dated July 23, 1947, which inclosed a form for "waiver and acceptance" and a form of "acknowledgment." The report proposed adjustments for the years 1941, 1942, and 1943, as well as 1944. The years 1941, 1942, and 1943 are not herein involved. For the year 1944 there was a proposed deficiency of $419,193.64 in excess profits tax and an overpayment of income tax of $102,816.60. The net deficiency for 1944 was $316,377.04. The letter stated that it was "not a final notice of deficiency and this office will be pleased to answer any questions which may occur to you in your examination of the inclosed copy of the report." The letter also stated that if plaintiff failed to file either a waiver and acceptance of the inclosed form or a written protest, within a thirty-day period, a final determination would be made and a notice of deficiency would be sent in accordance with the provisions of law applicable to the assessment and collection of deficiencies.

The report indicated that the principal cause of the change in the tax liabilities was adjustments of depreciation and excess profits credit which adjustments had been discussed with plaintiff's attorney who did not agree thereto.

The basis of disagreement was stated in the report as follows:

> The taxpayer has agreed to all adjustments made in this report with the exception of the amount determined to be the distributions in prior years out of accumulated earnings and profits.

2. Under date of August 14, 1947, the plaintiff returned the acknowledgment form with a letter to the collector of internal revenue at Chicago with reference to the year 1944. The letter stated that "part of the net tax will be made subject of a Protest to be filed with the agent in charge." The letter continued:

> It is our purpose hereby to stop the further running of interest on the net tax deficiency for 1944 by making a payment on account of so many dollars in principal of tax and so many dollars of interest on such tax. Therefore, find enclosed herewith a check payable to your order in the sum of $225,000.00 to apply on the tax principal and another check payable to your order for $33,750.00 to apply on interest accrued on the tax deficiency for this year.
>
> By reason of adjustments effective with the years 1942, -43, -44, a deficiency in tax will occur in 1945, and an amended return for 1945 is in the course of preparation and will be submitted to you at an early date. A tax deficiency for 1945 of approximately $150,000.00 at least is estimated. Accordingly, please find enclosed herewith another check in your favor to cover the expected tax deficiency for 1945 of $150,000.00 together with interest in the amount of $13,500.00 also covered by separate check payable to your order.

The acknowledgment form indicated that a part of the deficiency in tax determined by the revenue agent, which was not protested, had already been paid to the collector and a protest would be filed in the allotted time. Inclosed in the letter were the four checks for the amounts indicated. Plaintiff did not sign the form of waiver and acceptance.

3. Plaintiff filed a protest dated August 19, 1947, against the adjustments made in the revenue agent's report as follows:

(1) The agent failed to allow as a deduction for each of the years 1942, 1943 and 1944, respectively, the sums of $3,448.05, $3,973.50 and $4,498.45, which are Pennsylvania State Franchise tax, deductible in the year of liability. The tax accrues for payment on March 15 of each year following year of liability. It is believed that the agent merely overlooked these items in the final windup of his report. The figures can be supported and correction should be made.

(2) In determining equity invested capital for excess profits tax purposes, the agent erred in computing the amount of distributions made prior to the current taxable year (in each instance) not out of accumulated earnings and profits. The agent refers to this issue on page 4 of his report and taxpayer's position is outlined in letter dated May 21, 1947, prepared and submitted to you by its attorney, Mr. Glass. Such letter may be referred to by you as taxpayer's brief in support of the protest of this item.

A hearing before the Conference Section of your office is hereby requested and you are asked to notify its attorney, Spaulding F. Glass, c/c Lord, Bissell & Kadyk, 135 South LaSalle Street, Chicago 3, Illinois of the time for such hearing.

The questions raised in the protest of August 19, 1947, were later referred to the Bureau of Internal Revenue in Washington for a ruling.

4. Upon receipt of the checks, the collector credited his 9-D Unclassified Collection account on August 15, 1947, in the amount of the proceeds of the checks. At that time there were no unpaid assessments for the years 1944 and 1945, against which to credit the payment.

Thereafter, in due course of time, an assessment list was prepared upon which an assessment against the plaintiff in the amount of $225,000 of excess profits tax, together with interest of $32,625 computed to August 15, 1947, for the year 1944 was listed. This assessment list was certified on October 10, 1947, as having been determined to be due from plaintiff over the name of George J. Schoeneman, the then Commissioner of Internal Revenue. The name George J. Schoeneman was not placed thereon by Mr. Schoeneman. It was signed by an employee in the office of the Commissioner who had been previously authorized, in writing, by Mr. Schoeneman to sign Mr. Schoeneman's name to such lists. The practice of the signing by authorized persons had existed for many years prior to the time that Mr. Schoeneman was appointed commissioner and continued throughout his holding of that position. This practice grew out of the volume of documents requiring the signature of the commissioner, which was so great that had the commissioner personally signed, he would have had little or no time for anything else.

5. On November 14, 1947, the sums of $225,000 and $32,625 were transferred by the collector from the 9-D account and credited against the assessments of October 10, 1947. Subsequently an amount equal to the difference between the $33,750 sent in by plaintiff, as interest, and the sum of $32,625, assessed as interest, was considered as an overpayment. A refund of $1,125 was made to plaintiff in April 1948, with interest thereon for seven months and five days, amounting to $40.30.

6. The questions raised in the protest were not settled until sometime in April 1948. However, on December 5, 1947, plaintiff executed a consent agreement, extending the time for assessment for the year 1944 to December 31, 1948. The agreement was signed on behalf of the Commissioner

on December 16, 1947, in the same manner as described in finding 4. The final determination for the year 1944 was made in April 1948. On April 22, 1948, plaintiff executed a waiver of the restrictions on assessment and collection for the year 1944 with respect to an excess profits tax deficiency of $308,699.83. This waiver was received by the revenue agent on April 27, 1948. This amount was later reduced to $308,493.20. Inasmuch as $225,000 with interest of $32,625 has been placed on the October 10, 1947 assessment list, the difference between $308,493.20 and $225,000, namely $83,493.20, was thereupon placed on an assessment list, together with $16,028.41 as interest thereon. This assessment list was certified on behalf of the Commissioner of Internal Revenue in a same manner as described in finding 4.

7. The payment of the assessment of $83,493.20 and the interest was accomplished by credits of $22,116.42 and $62,786.59 on August 24, 1948, and the payment on September 2, 1948, of $14,618.60.

8. On an assessment list certified on December 10, 1948, in the same manner, described in finding 4, there was assessed against plaintiff for the year 1945 a deficiency of excess profits tax of $341,767.06, together with interest to September 12, 1948, in the amount of $40,323.40. There was a valid waiver of time applicable to this assessment. This excess profits tax deficiency with the interest thereon was paid as follows:

$13,500.00: Transferred January 17, 1949, from 9-D account.

$150,000.00: Transferred January 17, 1949, from 9-D account.

$21,345.20: Transferred February 16, 1949, from 9-D account.

$150,000.00: Transferred February 16, 1949, from 9-D account.

$33,239.09: Paid December 31, 1948.

$13,798.04: Credit January 5, 1949.

$208.13: Abated July 1, 1949.

The amount of $13,500 transmitted as a payment against estimated interest on the estimated tax deficiency for 1945, was, when transferred from the 9-D account, used to pay in part the deficiency and interest on the December 10, 1948 assessment.

9. A recomputation of the tax liability for the year 1944, based on the decision of March 6, 1957, shows an overpayment of excess profits tax of $254,901.53 with interest thereon of $40,882.62, and a deficiency in income tax of $119,252.17.

The amounts paid by the plaintiff within two years prior to the filing of the claim for refund on April 3, 1950, of the excess profits tax are $83,493.20 together with the interest thereon of $16,028.41. The amount of $83,493.20 of the excess profits tax is 32.75508 percent of the total overpayment. A similar percentage of the deficiency of income tax is $39,061.14. The net overpayment for 1944 amounts to $60,460.47.

10. A recomputation of the tax liability for the year 1945, based on the decision of March 6, 1957, shows an overpayment of excess profits tax of $74,239.34 with interest thereon of $8,713.92, and a deficiency in income tax of $34,731.85, leaving a net overpayment for 1945 of $48,221.41.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a mat-

ter of law that plaintiff is entitled to recover. It is, therefore, adjudged and ordered that plaintiff recover of and from the United States the amount of one hundred eight thousand six hundred eighty-one dollars and eighty-eight cents ($108,681.88), with interest as provided by law.

APPENDIX "B"

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 272. PROCEDURE IN GENERAL.

(a)(1) [as amended by Sec. 203 of the Act of December 29, 1945, c. 652, 59 Stat. 669] *Petition to the Tax Court of the Tax Court of the United States.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of Section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

* * *

* * * * *

(d). *Waiver of restrictions.*—The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subsection (a) of this section on the assessment and collection of the whole or any part of the deficiency.

* * * * *

(26 U.S.C. 1952 ed., Sec. 272.)

SEC. 322. REFUNDS AND CREDITS.

* * * * *

(b) *Limitation on Allowance.*—

(1) *Period Of Limitation.*—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the lated. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

• • • • • •

(26 U.S.C. 1952 ed., Sec. 322.)

APPENDIX "C"

The Legislative History of Section 272(d), Internal Revenue Code of 1939.

In order to place the entire issue in its proper framework of reference, two things should be remembered. First, Section 272 of the 1939 Internal Revenue Code is the direct descendant of Section 274 of the Revenue Act of 1924, 43 Stat. 253, C. 234. Second, Section 274 of the Revenue Act of 1924, was added to the law to supplement Section 900 of the Revenue Act of 1924 which created the Board of Tax Appeals.[1] That is, Section 274 of the Revenue Act of 1924 was a procedural section which established the procedure by which a taxpayer invoked the jurisdiction of the Board of Tax Appeals. The terms of Section 274 of the Revenue Act of 1924 are set forth below in toto.[2]

1. "Section 274(a): This subdivision provides for notice, and an opportunity for an appeal to the Board of Tax Appeals (a body provided for in Section 900 of the proposed Act), in cases in which the Commissioner *determined* that there is a deficiency." H. R. Rep. No. 179, 68th Cong., 1st Sess. (1939-1 (Part 2) Cum. Bull. 241, 258).

2. Sec. 274(a): If, in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the taxpayer, except as provided in subdivision (d), shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within 60 days after such notice is mailed the taxpayer may file an appeal with the Board of Tax Appeals established by section 900.

(b): If the Board determines that there is a deficiency, the amount so determined shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the Board shall be assessed, but a proceeding in court may be begun, without assessment, for the collection of any part of the amount so disallowed. The court shall include in its judgment interest upon the amount thereof at the rate of 6 per centum per annum from the date prescribed for the payment of the tax to date of the judgment. Such proceeding shall be begun within one year after the final decision of the Board, and may be begun within such year even though the period of limitation prescribed in section 277 has expired.

A reading of Section 274 of the Revenue Act of 1924 reflects that if the Commissioner determined a deficiency in tax, the taxpayer "shall" be notified of such deficiency by registered mail. After receipt of the notice of deficiency, the taxpayer was then given 60 days to file an appeal with the Board of Tax Appeals. Thereafter, if the Board determined a deficiency; the amount so determined shall be assessed and paid upon notice and demand. On the other hand, if the Board disallowed the deficiency or part of it, the collector could not assess as to that amount, but he could without assessment, begin a proceeding in court for the collection of any amount so disallowed by the Board.

(c): If the taxpayer does not file an appeal with the Board within the time prescribed in subdivision (a) of this section, the deficiency of which the taxpayer has been notified shall be assessed, and shall be paid upon notice and demand from the collector.

(d): If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay such deficiency shall be assessed immediately and notice and demand shall be made by the collector for the payment thereof. In such case the assessment may be made (1) without giving the notice provided in subdivision (a) of this section, or (2) before the expiration of the 60-day period provided in subdivision (a) of this section even though such notice has been given, or (3) at any time prior to the final decision by the Board upon such deficiency even though the taxpayer has filed an appeal. If the taxpayer does not file a claim in abatement as provided in section 279 the deficiency so assessed (or if the claim so filed covers only a part of the deficiency, then the amount not covered by the claim) shall be paid upon notice and demand from the collector.

(e): If the taxpayer has elected to pay the tax in installments and a deficiency has been assessed, the deficiency shall be prorated to the four installments. Except as provided in subdivision (d) of this section, that part of the deficiency so prorated to any installment the date for payment of which has not arrived, shall be collected at the same time as and as part of such installment. That part of the deficiency so prorated to any installment the date for payment of which has arrived, shall be paid upon notice and demand from the collector.

(f): Interest upon the amount determined as deficiency, or, if the tax is paid in installments, upon the part of the deficiency prorated to each installment, shall be assessed at the same time

Under the above procedure, both the Commissioner and the taxpayer would appear before the Board to present their cases. If a decision was in favor of the Commissioner, the tax could then be assessed, and the taxpayer was left to his remedy in the courts for a recovery of the tax.[3] If that decision was in favor of the taxpayer, the Commissioner could not assess the tax, but was left to his remedy in the courts in a suit to collect the alleged additional tax due.[4]

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as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax, or the payment of such installment, to the date the deficiency is assessed.

(g) (1): Where it is shown to the satisfaction of the Commissioner that the payment of a deficiency upon the date prescribed for the payment thereof will result in undue hardship to the taxpayer the Commissioner, with the approval of the Secretary (except where the deficiency is due to negligence, to intentional disregard of rules and regulations, or to fraud with intent to evade tax), may grant an extension for the payment of such deficiency or any part thereof for a period not in excess of eighteen months. If an extension is granted, the Commissioner may require the taxpayer to furnish a bond in such amount, not exceeding double the amount of the deficiency, and with such sureties, as the Commissioner deems necessary, conditioned upon the payment of the deficiency in accordance with the terms of the extension.

(g) (2): In such case there shall be collected, as a part of the tax, interest on the part of the deficiency the time for payment of which is so extended, at the rate of 6 per centum per annum for the period of the extension, and no other interest shall be collected on such part of the deficiency for such period. If the part of the deficiency the time for payment of which is so extended is not paid in accordance with the terms of the extension, there shall be collected, as a part of the tax, interest on such unpaid amount at the rate of 1 per centum a month for the period from the time fixed by the terms of the extension for its payment until it is paid, and no other interest shall be collected on such unpaid amount for such period.

3. H.R. Rep. No. 1, 69th Cong., 1st Sess. (1939-1 (Part 2) Cum. Bull. 315, 321).

4. H.R. Rep. No. 179, 68th Cong., 1st Sess. (1939-1 (Part 2) Cum. Bull. 241, 247).

However, there was no provision in Section 274, Revenue Act of 1924, whereby a taxpayer, who did not intend to appeal to the Board of Tax Appeals, could stop the running of interest after the day the notice of deficiency was issued until the Commissioner assessed the tax sometime after the 60 day period had expired. Section 274(c), Revenue Act of 1924, *supra*. Thus, a taxpayer was required to pay a minimum of 60 days extra interest simply because of a procedural block which prohibited the Commissioner from assessing the tax even though the taxpayer might have decided not to appeal to the Board of Tax Appeals.

Therefore, in 1926, Congress took up the problem and adopted the first waiver provision in the form of Section 274(d),[5] and said in explanation thereof, speaking through the Senate Finance Committee:[6]

> "The law provides that where a deficiency is assessed there shall be assessed at the same time interest at the rate of 6 per cent from the time the deficiency should have been paid to the date of assessment. In order to permit the taxpayer to pay the tax and stop the running of interest, the committee recommends in section 274(d) of the bill that the taxpayer at any time be permitted to waive in writing the restrictions on the Commissioner against assessing and collecting the tax, *but without taking away the right of the taxpayer to take the case to the Board.* It is provided that in such cases that the 6 per cent interest stops running on the thirtieth day after the filing of such waiver unless assessment is made before such time." (Emphasis supplied)

In other words, Section 274(d), Revenue Act of 1926,

5. "The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subdivision (a) of this section on the assessment and collection of the whole or any part of the deficiency." Section 274(d), Revenue Act of 1926, 44 Stat. 9, C. 27.

6. Sen. Rep. No. 52, 69th Cong., 1st Sess. (1939-1 (Part 2) Cum. Bull. 332, 352).

granted a right to the taxpayer, but without taking away any right to take the case to the Board. Since Section 274 (a), Revenue Act of 1926, provided that a taxpayer cannot appeal to the Board until he has received a statutory notice of deficiency, it is obvious that the new waiver subsection only applied after the taxpayer had received the notice of deficiency. This is the only conclusion possible in view of the Senate Finance Committee statement that Section 274(d), Revenue Act of 1926, permitting waivers, does not take away the right of the taxpayer to appeal to the Board. Clearly, the above-quoted language of the Senate Finance Committee shows that the waiver provisions of Section 274(d), Revenue Act of 1926, were designed to relieve the taxpayer from paying interest on an asserted deficiency, after a notice of deficiency was issued, for the 60-day period within which an appeal could be taken to the Board.

In view of the above-quoted explanation, by the Senate Finance Committee, of the meaning of Section 274(d) of the Revenue Act of 1926, it was not surprising that the Ninth Circuit held in the 1933 case of *Mutual Lumber Co.* v. *Poe, supra*, that waivers filed before the issuance of a notice of deficiency were premature and powerless to prevent the Commissioner's resort to a notice of deficiency, and said, at page 907:

> "... If there is no *determination* of a deficiency by the Commissioner, there is no right of appeal to waive; for the provisional report of an internal revenue agent cannot be made the basis of an appeal." (Emphasis supplied)

Possibly this understanding was one of the reasons why Judge Sawtell also said, at pages 906-907:

> "Section 274(a), supra, (26 USCA 1048), contains the initial and important condition, "if in the case of

> any taxpayer the Commissioner determines that there is deficiency in respect of the tax imposed by this chapter,' etc. This condition, set out at the very beginning of the section, assuredly qualifies all the other provisions contained in such section."

Nor was it unexpected that the *Mutual Lumber Co.* v. *Poe* case, *supra*, was reaffirmed and followed by the Ninth Circuit in the 1935 decision of *McCarthy Co.* v. *Commissioner*, *supra*, wherein Judge Garrecht said, at page 621:

> "It has already been decided by this Court that a waiver or consent of that kind, filed before the Commissioner has sent a notice of deficiency, *is premature and therefore invalid.* In Mutual Lumber Co. v. Poe, 66 F. 2d. 904, 906, certiorari denied, 290 U.S. 706, the late Judge Sawtelle said . . ." (Emphasis supplied)

Following the *Mutual Lumber Co.* v. *Poe*, and *McCarthy v. Commissioner* cases, *supra*, and because these were the only decided cases interpreting Section 274(d), Revenue Act of 1926, the question of the validity of waivers filed before issuance of a notice of deficiency was taken up in 1938 by a Subcommittee on Ways and Means.

The report[7] issued by this Subcommittee stated:

> "As a result of two decisions of the Circuit Court of Appeals for the Ninth Circuit (Mutual Lumber Co. v. Poe, 66 F. 2d 906 certiorari denied Jan. 6, 1936; McCarthy Co. v. Commissioner, 80 F. 2d 618, certiorari denied April 6, 1936), a valid waiver cannot be given by a taxpayer prior to the formal determination by the Commissioner, as evidenced by a 60 or 90 day letter that there is a deficiency in tax."

Consequently, the subcommittee recommended an amend-

7. Report of Subcommittee of the Committee on Ways and Means, 75th Cong., 3rd Sess. on Proposed Revisions of the Revenue Laws 1938.

ment to what was then Section 272(d) (successor to Section 274(d), Revenue Act of 1926):

> " . . . to insure the validity of waivers given before the mailing of the deficiency letter providing that the taxpayer shall have the right, at any time after a deficiency is proposed in any manner that the Commission may direct, whether before or after sending of the notice of deficiency, as provided in subsection (a), to waive by a signed notice in writing, any and all restrictions or conditions however imposed on the immediate assessment and collection of the whole or any part of the deficiency so proposed."

However, this amendment was *not* adopted by the Ways and Means Committee and the language of Section 272(d), Internal Revenue Code of 1939 (successor to Section 274(d), Revenue Act of 1926) remained exactly as it was when the Senate Finance Committee Report of 1926[8] first introduced the subsection to the law as a measure whereby interest could be stopped, *"but without taking away the right of the taxpayer to take the case to Board."*

Therefore, on September 23, 1941, the Commissioner of Internal Revenue sought corrective legislation by publishing a Proposed Internal Revenue Administrative Code.[9] In the proposed code, which the Commissioner said would eventually be submitted to Congress, Section 2604 would have granted the taxpayer the right to waive the restrictions "at any time after the date prescribed for filing the return."[10] This language was designed to overcome the

8. Sen. Rep. No. 52, 69th Cong., 1st Sess. (1939-1 (Part 2) Cum. Bull. 332, 352).

9. Letter of Commissioner of Internal Revenue, 1941-2 Cum. Bull. 368.

10. Harriet Geary, The Proposed Internal Revenue Administrative Code, 20 Taxes 390 at 398 (1942); See footnote 53 at 9 Mertens, Law of Federal Income Taxation, § 49.99, p. 87 (1943).

Mutual Lumber Co. v. *Poe* and *McCarthy* v. *Commissioner* cases, *supra*, holding that waivers to be valid under Section 272(d) of the 1939 Internal Code must be preceded by the issuance of a statutory notice of deficiency.[11]

However, like the 1938 proposed amendment, Section 2604 never became a part of income tax law until 1954 when Congress finally *changed* the language of Section 272(d). Thus, Section 6213(d) of the 1954 Internal Revenue Code added the following italicized words to what had previously been Section 272(d) of the 1939 Internal Revenue Code:

> "Sec. 6213(d) Waiver of Restrictions—The taxpayer shall at any time *(whether or not a notice of deficiency has been issued)* have the right, by a signed notice in writing filed with the Secretary or his delegate, to waive the restrictions provided in subsection (a) on the assessment and collection of the whole or any part of the deficiency."

In view of the above history of Section 272(d) of the 1939 Internal Revenue Code, it is submitted that the cases of *Mutual Lumber Co.* v. *Poe*, *supra*, and *McCarthy* v. *Commissioner*, *supra*, correctly interpreted that subsection to mean that waivers filed before the Commissioner issued a notice of deficiency were premature and invalid. Surely this is the only interpretation which squares with the intention of Congress when it first placed the applicable language in a revenue act and said the waiver section did not take away the right of the taxpayer to appeal to the Board of Tax Appeals. Furthermore, Congress took no steps to change the language of Section 272(d) of the 1939 Internal Revenue Code until 1954, even though it had been told in 1938 by a Subcommittee of the Ways and Means

11. *Ibid.*

Committee that the Ninth Circuit had held such waivers invalid, and it had seen Section 2604 of the Internal Revenue Administrative Code proposed by the Commissioner of Internal Revenue in 1941. Then when Congress finally did alter the substance of Section 272(d) of the 1939 Internal Revenue Code, it added the phrase "whether or not a notice of deficiency has been issued." Respondent submits that this failure of Congress to act, after notice, for nearly 20 years, coupled with the changed language of Section 6213(d) of the 1954 Internal Revenue Code is strong support of the conclusion that Section 272(d) of the 1939 Internal Revenue Code meant exactly what the Court said it meant in the *Mutual Lumber Co.* and *McCarthy Co.* cases, *supra*. Also when this later legislative history is considered in the light of the language of the original Senate Finance Committee report which introduced the same statutory language found in Section 272(d) of the 1939 Internal Revenue Code, it is difficult to see how one could support a contention that the *Mutual Lumber Co.* v. *Poe* and *McCarthy* v. *Commissioner* cases, *supra*, should be overruled unless those cases holding contra (*Moore* v. *Cleveland Ry. Co.*, *supra*, and *Associated Mutuals, Inc.* v. *Delaney*, *supra*.) are better reasoned or are based on statutory language which is clear and unambiguous.

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No. 179

In the Supreme Court of the United States

OCTOBER TERM, 1959

GENERAL OUTDOOR ADVERTISING CO., INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
EDWARD A. TAMM,
Acting Assistant Attorney General,
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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 179

GENERAL OUTDOOR ADVERTISING CO., INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Claims (Pet. 1a–13a) is reported at 169 F. Supp. 947. A prior opinion of that court entered in this case is reported at 149 F. Supp. 163.

JURISDICTION

The judgment of the Court of Claims was entered on February 11, 1959 (Pet. 1a, 12a–13a), and a timely petition for rehearing was denied on April 29, 1959. The petition for a writ of certiorari was filed on July 6, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the two-year period of limitation within which a claim for refund may be filed under the provisions of Section 322(b) of the Internal Revenue Code of 1939 commences to run from the time a portion of the tax is paid, or only from the time the entire tax is paid.

2. Whether the Commissioner is required to send a taxpayer a notice of deficiency (90-day letter), pursuant to the provisions of Section 272(a)(1) of the 1939 Code, with respect to a portion of the tax voluntarily paid by the taxpayer.

STATUTE INVOLVED

Section 271(a), Section 272 (a) and (d), Section 321, Section 322 (a) and (b), and Section 3772(a) of the Internal Revenue Code of 1939 are set forth in Appendix, *infra*, pp. 12–14.

STATEMENT

The issue here involves the amount of tax which the taxpayer is entitled to recover under a previous decision by the Court of Claims in this case.[1] There, the controversy related to the amount of excess profits credit the taxpayer was entitled to for the years 1944 and 1945. Determination of that question depended upon the valuation of the two items included in the taxpayer's invested capital, namely, good will and land and buildings. The court sustained the Commissioner's determination of the value of the good

[1] Reported at 149 F. Supp. 163 (March 6, 1957), certiorari denied, 355 U.S. 891.

will, but held that he had erroneously reduced the value of the land and buildings placed on them by the taxpayer. In the latter respect, however, the court also held that the claim for refund based upon this erroneous valuation and filed on April 3, 1950, was not an amendment of the original claim, but rather an independent claim, and hence that, under the provisions of Section 322(b) of the Internal Revenue Code of 1939, the taxpayer could only recover payments of tax made within two years prior to the date the claim of April 3, 1950, was filed. Accordingly, the court held that the taxpayer was entitled to have its excess profits credit recomputed on this basis, and that the amount of the recovery was to be determined pursuant to Rule 38(c) of its rules. (Pet. 1a; 149 F. Supp. 163.) The taxpayer filed a petition for a writ of certiorari by which it sought review of the holding that the claim for refund filed on April 3, 1950, was an independent claim rather than an amendment of an original claim. This Court denied the petition, and the question of the amount of recovery giving rise to the present controversy came before the court below.

Specifically, the controversy relates to whether the taxpayer is entitled to recover a remittance of $225,000 and interest for 1944 taxes made by it in August, 1947, prior to a notice of deficiency or assessment. The facts giving rise to this controversy are as follows:

In May 1947, an Internal Revenue Agent made an examination of the taxpayer's tax returns for the years 1941–1944, inclusive. For the year 1944, the

only year involved here, the Agent's report proposed a deficiency of $419,193.64 in excess profits tax and an overpayment of income tax of $102,816.60. The net deficiency for 1944 was $316,377.04. (Pet. 2a, 7a.)

A copy of this report was furnished to the taxpayer with a letter dated July 23, 1947, which enclosed a form for "waiver and acceptance" and one for acknowledgment of receipt of the report with an expression of the taxpayer's position with respect to it. The letter stated that it was "not a final notice of deficiency". The taxpayer did not execute the form for waiver and acceptance, but did execute the form headed "Receipt of Revenue Agent's Report" indicating that it did not agree with the Agent's report in full, that it intended to file a protest to part of the report, and that it was enclosing a check in part payment of the deficiency in tax indicated in the report. (Pet. 2a–3a, 7a–8a.)

The document was enclosed in a letter of the same date (August 14, 1947), which read in part (Pet. 3a–4a, 8a):

> * * * Part of the net tax will be made the subject of a Protest to be filed with the agent in charge.
>
> It is our purpose hereby to stop the further running of interest on the net tax deficiency for 1944 by making a payment on account of so many dollars in principal of tax and so many dollars of interest on such tax. Therefore, find enclosed herewith a check payable to your order in the sum of $225,000.00 to apply on the tax principal and another check payable to your

order for $33,750.00 to apply on interest accrued on the tax deficiency for this year.

Enclosed also were two checks, one for $225,000 on account of the 1944 tax deficiency, and the other for $33,750 as accrued interest. (Pet. 4a.)

Upon receipt of these checks, the Collector credited them to the unclassified collection account, since at that time there was no unpaid assessment for 1944 against the taxpayer to which the payment could be credited. About two months later, on October 10, 1947, without the taxpayer's knowledge, an assessment for the year 1944 of $225,000 as excess profits tax and $32,625 as interest, computed to August 15, 1947, was made. About a month after the assessment, on November 14, 1947, the sums were transferred by the Collector from the unclassified account and credited against the assessment of October 10, 1947. (Pet. 4a, 9a–10a.)

A refund of $1,125,[2] as an overpayment of this assessment, was the first actual notice the taxpayer had of this assessment. This was in April, 1948. (Pet. 4a, 10a.)

Meanwhile, the taxpayer had protested the remainder of the adjustments covered by the original report and final determination by the Commissioner of the total deficiency was not made until April, 1948. (Pet. 9a, 10a-11a.) The total deficiency was fixed at $308,493.20, and, when the prior payment of $225,000 was deducted, a deficiency of $83,493.20, plus interest of

[2] This sum represented the difference between the amount ($33,750) remitted by taxpayer as interest and the sum of $32,625 assessed as interest. (Pet. 10a.)

$16,028.41, was placed on the assessment list on October 10, 1947. This balance was paid in August and September, 1948. (Pet. 11a.) The claim for a refund was filed on April 3, 1950.

The court held that the October 10, 1947, assessment and the subsequent application to this assessment of the remittance of $225,000 were valid, and that the refund claim as to that amount is barred by the two-year statute of limitations. (Pet. 6a.)

The taxpayer's motion for rehearing, protesting the action of the court in failing to allow recovery of the payment of $225,000, plus interest, was denied on April 29, 1959.

ARGUMENT

The taxpayer's contentions (1) that the decision of the court below "stands in direct opposition" to the principles announced by this Court in *Flora* v. *United States*, 357 U.S. 63, rehearing granted, June 22, 1959, and (2) that it is in conflict with the decision of the Ninth Circuit in *United States* v. *Price*, 263 F. 2d 382, certiorari granted, 359 U.S. 988, are totally without merit.

1. The holding of this Court in the *Flora* case is simply that a taxpayer must pay the full amount of an assessed tax due including the full amount of an income tax deficiency before he may challenge its correctness by a suit for refund under 28 U.S.C. 1846 (a)(1). Here, as the taxpayer admits (Pet. 4–5) and as shown by the findings of the court (Pet. 11a), the entire amount of the tax had been paid either by cash or credits, prior to the time taxpayer invoked the jurisdiction of the Court of Claims under 28 U.S.C.

1491. In view of this fact, there is no conflict with the *Flora* decision.

The taxpayer, however, seeks to extend the principle of "full" payment of tax to the commencement of the two-year limitation period for claiming a refund (Section 322(b) of the Internal Revenue Code of 1939, Appendix, *infra*, p. 14). There is no justification for this either in logic, the language of Section 322(b), or in this Court's opinion in the *Flora* case.

In the first place, the provisions of Section 322(b)(1) and (2) are directed to the refund of overpayment of the "tax" and or of an "installment of the tax"; this is apparent from the provisions of Sections 321 and 322(a) of the 1939 Code. (Appendix, *infra*, pp. 13–14.) As to such payments, Section 322(b)(1) imposes a time limit upon the allowance of a refund, and provides, in material part, that unless a claim for refund is filed by a taxpayer within three years from the time the return is filed or within two years from the time the tax is paid, no refund shall be allowed or made after the expiration of whichever of such periods expires the later. Section 322(b)(2) imposes a limit on the amount of the refund, and is directly applicable to the facts of this case. It provides, as limited by paragraph (B) thereof, that if a claim for refund is filed, though not within three years from the time the return was filed by the taxpayer, the amount of refund shall not exceed the "portion of the tax" paid during the two years immediately preceding the filing of the claim. When the provisions of Section 322(b)(1) are read in the light of subsection

(2)(B), and the provisions of Section 321, it is obvious that the word "tax" means any "portion" or "installment" of the tax paid, and not the full amount of the tax.

Where, as here, the taxpayer acquiesced in the proposed deficiency to the extent of $225,000, the remittance of that amount by the taxpayer prior to assessment with the intent that it be used to discharge his liability, afforded, as the Court of Claims found, justification for the Commissioner in making the assessment of the $225,000 and in satisfying it with taxpayer's remittance of that amount. (Pet. 5a–6a). *Hill* v. *United States*, 263 F. 2d 885 (C.A. 3). See also *Roseman* v. *United States*, 323 U.S. 658; *Lehigh Portland Cement Co.* v. *United States*, 30 F. Supp. 217 (C. Cls.); *Lewyt Corp.* v. *Commissioner*, 215 F. 2d 518, 522–523 (C.A. 2), modified on other grounds, 349 U.S. 237. To hold, as taxpayer argues (Pet. 8), that such installment or partial payment cannot be made the subject of an "effective" refund claim and is not a "recoverable" tax, would nullify the plain language of Section 322(b) (1) and (2). It does not follow that since payment of the entire tax is a condition precedent under which the United States has consented to be sued in a refund suit, the same requirement exists with respect to the filing of a claim for refund either as a condition to recovery of an alleged overpayment of tax through administrative action under the provisions of Section 322, or by suit. When recovery is sought by suit, Section 3772(a)(1) of the 1939 Code (Appendix, *infra*, p. 14) imposes two dis-

tinct conditions upon a taxpayer, namely, that, as held in *Flora*, the tax has been paid in full prior to suit, and that a proper and timely refund claim has been filed.[3] In this latter respect, the *Flora* decision has no application.

2. The question presented in *United States* v. *Price*, *supra*, is whether the issuance of a 90-day notice of deficiency (provided for in Section 272(a)(1) of the 1939 Code, Appendix, *infra*, pp. 12–13) is essential to the validity of an assessment of federal income taxes where, prior to assessment, a taxpayer has filed (as provided in Section 272(d) of that Code, Appendix, *infra*, p. 13) a waiver of restriction on assessment and collection. The Ninth Circuit held (263 F. 2d 382) that it was. As previously indicated, the United States is contesting that holding before this Court. However, assuming, *arguendo*, that the decision of the Ninth Circuit is correct, it nevertheless has no application to the assessment of that portion of the tax ($225,000) voluntarily paid by the taxpayer prior to its assessment.[4]

Section 271(a)(1) (Appendix, *infra*, p. 12) which defines the term "deficiency", indicates that a valid tax may be "collected without assessment". Furthermore, our system of federal taxation is basically one of annual self-assessment,[5] and where, as here, the

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[3] *United States* v. *Felt & Tarrant Co.*, 283 U.S. 269, 272–273; *Rosenman* v. *United States*, 323 U.S. 658, 661.

[4] It is also to be noted that in the *Price* case the United States instituted suit in which it sought to collect the balance of the unpaid assessment.

[5] *Manning* v. *Seeley Tube & Box Co.*, 338 U.S. 561, 565; *Spies* v. *United States*, 317 U.S. 492; *Helvering* v. *Mitchell*, 303 U.S. 391.

taxpayer admitted an additional liability as indicated by the report of Internal Revenue Agent (Pet. 3a–4a, 8a), and made a payment of $225,000 to be applied against that liability, the tax was to that extent self-assessed, irrespective of any formal act of assessment by the Commissioner. *Hill* v. *United States* 263 F. 2d 885 (C.A. 3). As to that amount, as the court below said (Pet. 6a), the taxpayer waived the notice required by Section 272(a)(1). Cf. *Lehigh Portland Cement Co.* v. *United States*, 30 F. Supp. 217 (Ct. Cls.).

Again, once the sum of $225,000 had been applied in part payment of the tax ultimately determined by the Commissioner to be due, there was, to that extent, no "deficiency" to be determined by the Commissioner. Since Section 272(a) authorizes the Commissioner to mail a notice of "deficiency" to a taxpayer only in case he determines that a deficiency exists, there was no reason for mailing such a notice with respect to the amount ($225,000) of tax already paid.

Section 272(a) was enacted to assure taxpayers the right to litigate a proposed deficiency assessment in the Tax Court prior to its payment,[6] and the only purpose of the notice of deficiency (90-day letter) is to apprise a taxpayer of the nature and amount of the deficiency in tax determined by the Commissioner in order to afford him the opportunity to contest it prior to its assessment and collection.[7] The purpose

[6] See *Old Colony Tr. Co.* v. *Commissioner*, 279 U.S. 716.

[7] *Commissioner* v. *Forest Glen C. Co.*, 98 F. 2d 968, 971 (C.A. 7); *Commissioner* v. *Stewart*, 186 F. 2d 239, 241 (C.A. 6); *Standard Oil Co.* v. *McMahon*, 244 F. 2d 11 (C.A. 2); *United States* v. *Curd*, 257 F. 2d 347, 350 (C.A. 5), certiorari denied, 358 U.S. 920.

of Section 272(d) is to stop the accrual of interest if a taxpayer waives the restrictions of Section 272(a), thus permitting the immediate assessment and collection of a deficiency.[8] The basic and essential restriction imposed by Section 272(a) is that the Commissioner cannot assess and collect until expiration of the period provided following the mailing of a deficiency notice. To the extent that a tax liability is admitted and paid, as here, such restriction is meaningless. The *Price* case did not involve any such problem and hence the holding of the Ninth Circuit therein is not in conflict with the decision below.

CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted.

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AUGUST 1959.

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[8] See *Moore* v. *Cleveland Ry. Co.*, 108 F. 2d 656, 659 (C.A. 6); *Payson* v. *Commissioner*, 166 F. 2d 1008, 1009–1010 (C.A. 2); and *Roos* v. *United States*, 31 F. Supp. 144 (C. Cls.).

APPENDIX

SEC. 271 [as amended by Sec. 14(a), Individual Income Tax Act of 1944, c. 210, 58 Stat. 231]. DEFINITION OF DEFICIENCY.

(a) *In General.*—As used in this chapter in respect of a tax imposed by this chapter, "deficiency" means the amount by which the tax imposed by this chapter exceeds the excess of—

(1) the sum of (A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus (B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

(2) the amount of rebates, as defined in subsection (b)(2), made.

* * * * *

(26 U.S.C. 271.)

SEC. 272 [as amended by Sec. 203(a), Act of December 29, 1945, c. 652, 59 Stat. 669]. PROCEDURE IN GENERAL.

(a)(1) *Petition to The Tax Court of the United States.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day) the taxpayer may file a petition with the Tax Court of the United States for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a

petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 3653 (a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. * * *

* * * * * *

(d) *Waiver of Restrictions.*—The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subsection (a) of this section on the assessment and collection of the whole or any part of the deficiency.

* * * * * *

(26 U.S.C. 272.)

SEC. 321. OVERPAYMENT OF INSTALLMENT.

If the taxpayer has paid as an installment of the tax more than the amount determined to be the correct amount of such installment, the overpayment shall be credited against the unpaid installments, if any. If the amount already paid, whether or not on the basis of installments, exceeds the amount determined to be the correct amount of the tax, the overpayment shall be credited or refunded as provided in section 322.

(26 U.S.C. 321.)

SEC. 322 [as amended by Sections 169(a) and 172(c)(1) of the Revenue Act of 1942, c. 619, 56 Stat. 798]. REFUNDS AND CREDITS.

(a) *Authorization.*—

(1) *Overpayment.*—Where there has been an overpayment of any tax imposed by this chapter, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

* * * * * *

(b) *Limitation on Allowance.*—

(1) *Period of limitation.*—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

(2) *Limit on amount of credit or refund.*—The amount of the credit or refund shall not exceed the portion of the tax paid—

* * * * *

(B) If a claim was filed, and (i) no return was filed, or (ii) if the claim was not filed within three years from the time the return was filed by the taxpayer, during the two years immediately preceding the filing of the claim.

* * * * *

(26 U.S.C. 322.)

SEC. 3772. SUITS FOR REFUND.

(a) *Limitations.*—

(1) *Claim.*—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

* * * * *

(26 U.S.C. 3772.)

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No. 179

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

GENERAL OUTDOOR ADVERTISING CO., INC.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Claims

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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August, 1959

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---

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

The opposition brief of the United States, respondent herein, raises a new question which goes beyond the questions and reasons given in the petition for granting the writ of certiorari to the United States Court of Claims, as well as new matters related to the questions presented by the petition on file to which brief reply should be made.

The writ should issue for the further reason that the decision below is in direct conflict with the principles of law enunciated in the following cases:

Rosenman v. *United States*, 323 U.S. 658.

United States v. *Dubuque Packing Company*, 233 F. 2nd 453, 8 Cir., (1956).

Thomas v. *Mercantile National Bank at Dallas*, 204 F. 2nd 943, 5 Cir., (1953).

Lewyt Corporation v. *Commissioner*, 215 F. 2nd 518, 2 Cir., (1954).

Infra, Sec. 4, pages 7-15, inclusive.

The prior petition for writ of certiorari, denied, covered two issues, viz.: Value of Goodwill determinable under Section 718(a) 2 of the Code and the Amended Claim of April 3, 1950 for 1944, not only the latter as mentioned. (Br. 3) The issues here are new. (Pet. p. 2), (Reply pp. 7-15).

1.

Respondent says there is no justification in logic, in the language of Section 322(b) of the 1939 Code or in this Court's opinion in the *Flora* case to invoke the principles thereof as petitioner expressed in its petition. (Br. 7—Pet. 5-8)

What would be the sense of filing a claim for refund under Section 322(b) of a part payment of an expected or assessed "tax" before final payment if it would not hold up in court as a "stated claim upon which relief could be granted"? It would be a useless act. It is logical and follows legally; to expect the Commissioner of Internal Revenue to deny and reject all such future claims, if *Flora* is affirmed upon rehearing.

Assuming, *arguendo*, in this case, that the $225,000 in question constituted a partial payment of a "tax," (instead of a payment on account in respect of a tax, which petitioner vigorously contended it to be in the court below) it is submitted that *Flora* has decided that Section 322(b) must be construed to mean that the future event of full payment redefines the time when the limitation period of two years for filing refund claims shall begin to run. Under

the decision the limitation period begins to run two years from the time when the "*full tax*" defined as the "*tax*" for a taxable period is paid. Hence, in this case, said limitation period, (as applied to the $225,000 "tax" payment) began to run on September 2, 1948, the final payment date for 1944 and the April 3, 1950 refund claim is timely to recovery without limitation. To put it another way, the sum in question is the payment of "tax" within the two-year period prior to April 3, 1950, and as such would be recoverable. This is the view of the *Flora* decision expressed by Counsel representing *Flora* in the Reply to the Solicitor General's Memorandum in Opposition to Petition for Rehearing (pp. 11-14). The question, therefore, is one before the Court to decide. Quoting from page 12, first paragraph, it will be seen that the Limitation Period on Claims for Refund is there involved:

> "It seems logical that, in fixing a period of limitation, Congress would sieze upon a date which coincided with the accrual of the cause of action. It is not reasonable to presume that Congress intended the date of payment of a subsequent assessment to start anew the running of the statute of limitations for filing a claim for refund of a prior collection. The effect of such a construction is to date the limitation period from a future event having no immediate connection with the wrongful act complained of."

Counsel for *Flora* say that the government thus has reversed its position of 1934 on the time of accrual of the cause of action and the running of the limitation period on refund claims, a question for this Court to decide, and applicable here.

2.

In treating with *United States* v. *Price*, 263 F.2nd 382; certiorari granted, 359 U.S. 988, respondent says under the assumption that the Ninth Circuit decision is correct

that it "has no application to the assessment of that portion of the tax ($225,000) *voluntarily* paid by the taxpayer prior to its assessment." The Government made this same point before the lower court, which was answered by petitioner to the apparent satisfaction of the Court of Claims as "voluntary payment" was not mentioned in the decision, except to say that was defendant's contention. (Pet. 1-a) Section 56 of the 1939 Internal Revenue Code is the only provision which defines a voluntary payment—"Voluntary Advance Payment.—A tax imposed by this chapter, or any installment thereof, may be paid, at the election of the taxpayer, prior to the date prescribed for its payment." Section 321 is related solely to installments—prescribed payments, and is inapplicable here. (Br. 7-8). Petitioner, in its Reply Brief dated June 25, 1958, pp. 13-15, presented the answer on this point. We correctly said that Sec. 56(d) was a provision under Chapter 2, Income Tax, applicable only to income tax payments, and there was *no date prescribed* for the payment here made on account to stop interest, a legal consideration: that payment was conditional, not voluntary. Prior to enactment of Section 6213(b) (3) of the 1954 Code, the only means by which a taxpayer could stop interest by paying so much on account, was to execute an effective Sec. 272(d) Waiver *after* final notice of a deficiency. This petitioner did not do. That is the case of *U. S.* v. *Price*, *supra*.

Under 2, page 9 of respondent's brief, it is argued that Section 271(a)(1) indicates that "a valid tax may be collected without assessment." Sub-division (a)(1)(B) of Sec. 271 in modification of the premise "deficiency" means the amount by which the tax imposed by this chapter exceeds the excess of . . . . ," "the amounts previously assessed (or collected without assessment) as a deficiency, over . . . . ." On August 14, 1947 when petitioner paid the $225,000 in

question, there was no amount outstanding *as a deficiency*. There was a *proposed* deficiency shown by a revenue agent's report of which petitioner had been advised by letter dated July 23, 1947. That was all. There was no defined or determined deficiency. *Dubuque Packing Company* v. *U. S.*, infra, p. 10. Consequently, the amount remitted to the Collector on August 14, 1947, was not a collection of a part of a deficiency without assessment as the statute means.

Also, respondent's argument on "self-assessment" (Br. 9-10) is unsupported as on August 14, 1947, there was no defined or determined tax liability in any amount. The "self-assessment" in *Hill* was based on taxpayer's original return.

Respondent's brief, page 9:

Manning v. *Selby Tube & Box Co.* (Br. 9, footnote 5) is not in point here. It involved a question of whether interest on a prior deficiency should be abated because of the effect on net income of a carry-back operating loss, a provision of the 1942 Revenue Act which is non-retroactive.

Spies v. *United States* (Br. 9, footnote 5) also not in point, was a criminal case involving Section 145(b) of the 1936 Revenue Act, which deals with a willful attempt to evade or defeat a tax, and in that case the question of a certain charge to a jury.

Helvering v. *Mitchell* (Br. 9, footnote 5) involves Section 146(b) of the 1928 Revenue Act, 26 U.S.C.A. Sec. 145(b), 293(b), and is not in point here, nor does it touch on the point to which it is keyed.

3.

Lehigh Portland Cement Co. v. *United States* cited by respondent (Br. 8-10) and *alone* cited by the court below in

justifying its decision, involves a question which herein arises only indirectly if at all, and is not in point. In that case the Commissioner made what is termed a premature assessment of tax after sending taxpayer a 60-day final notice of deficiency. Taxpayer did not timely avail itself of the right to enjoin the Commissioner from making the assessment. The Court held it had slept on its rights and denied relief. In this case petitioner was not even advised of the $225,000 assessment of October 10, 1947, until April 19, 1948. This date is derived from the period for which interest on $1,125.00 was refunded. (Pls. Ex. 25, Pet. 10-a), (Pet. 4-a, 10-a, 11-a). This is an admitted fact (Br. 5). The Commissioner and petitioner consummated their agreement to $308,493.20 as the adjusted excess profits tax deficiency on April 27, 1948. Petitioner signed the Form 874 agreement (Sec. 272(d) Waiver) on April 22, 1948. It would be conscienceless to hold that petitioner slept on its rights by not seeking to enjoin the collector on the unjustified, illegal assessment made six months before it was informed of it and while petitioner was in the last stages of making an agreement with the Commissioner as its tax liability or tax debt. The application of the doctrine of laches by the court below in such a case is indeed thoughtless or an extreme injustice. Petitioner had no right or occasion to investigate the Commissioner's private records to keep abreast of what he was doing with its $225,000 which it had a right to assume, by the endorsement on its check, was still being held on April 22, 1948 in the Collector's Unclassified Collection account, his Collection Suspense Account. *John Nitsos* v. *United States*, U.S. Dist. Ct. (Ala. So. Div. April 1958—unreported—58-1 U.S.T.C. par. 9491, 1 A.F.T.R. 2nd, 1543. Petitioner did not waive its right to a final notice of deficiency (Sec. 272(a)(1)) under authority of *Lehigh* as the court below indicated.

4.

The new question raised by respondent's brief, upon which it is desirable to comment is as follows:

> *Was the $225,000 payment to the Collector on August 14, 1947, the payment of a deficiency in excess profits tax for the year 1944, or a payment of money on account solely for the purpose of stopping the running of interest on that amount, pending a determination of the correct amount of petitioner's liability placed in contest of which the Commissioner's representatives, the Collector and Revenue Agent in Charge were concurrently advised?*

Prior to the enactment of Section 6213(b)(3) in the 1954 Internal Revenue Code, the Commissioner had no authority to assess a payment made in respect of a tax as distinguished from a payment of tax, ergo, an assessment of a partial payment of a proposed deficiency was invalid, unless the tax was in jeopardy, or covered by a Sec. 272(d) Waiver. The assessment of October 10, 1947, was invalid because the $225,000 was a payment *in respect of* a deficiency in tax to be thereafter determined and which was not determined nor defined until after the Protest was decided upon by the Commissioner in April 1948. The case of *Hill* v. *United States*, 263 F.2nd 885 (C.A. 3) cited by respondent (Br. 8) favors petitioner's position. The Court's conclusion in respect of the payment there involved was:

> "The difference then, is whether a taxpayer gives the Government money in discharge of his tax debt or gives it money to stop interest and penalties while he and the Government contest *what the debt is to be.* * * *" (Emphasis supplied)

In *Rosenman* v. *United States*, 323 U.S. 658, also cited by respondent, this Court was quoted in *Hill*, supra, to have spoken as follows in describing such a payment as was made by petitioner in this case:

> "They are, as it were, payments in escrow. They are set aside * * * in special suspense accounts established for depositing money received when no assessment is then outstanding against the taxpayer * * * Money in these accounts is held not as taxes duly collected are held but as a deposit made in the nature of a cash bond for the payment of taxes thereafter found to be due."

Quite plainly "what the debt is to be" means a definition of *items* and the *amount* of the debt or liability. In this case that *could not be* and *was not* defined or ascertained until the Protest was decided. The $225,000 was paid on a disputed account for 1944. No items of adjustment to equal or define such payment were admitted. There was no "remainder of the adjustments" protested in amount. (Br. 5) The Protest covered 1942, 1943, and 1944 taxes. There was no "account stated" nor an "account settled."

Petitioner by the terms of its communications of August 14, 1947 did not admit liability for $225,000 of the proposed deficiency, for the reason that such payment did not result in an "account stated" or an "account settled." Certain well-settled principles apply to an "account stated." Among them are that the parties must agree on the balance struck, and that where there is a dispute and disputed items between the parties composing the account as a whole, and the *balance due* is not admitted between them, there is no "account stated." There was such a dispute until the Protest was disposed of. *Mertens-Law of Federal Income Taxation*, Sec. 58 A.14, pages 40-42. See also *Words and Phrases*, showing many cited cases on the subjects of an "account stated" and an "account settled." After the dispute was settled under the Protest filed, the liability for taxes for the years 1941, 1942, 1943 and 1944 was adjusted, for Pennsylvania taxes, *other taxes under G.C.M. 25,298*[1] and

[1] This later became the third item protested.

the question of distributions in prior years out of accumulated earnings. Only then was there an "account stated." On September 2, 1948 there was an "account settled." This dispute nullifies the court's conception of an admitted liability for a deficiency in 1944 excess profits tax of $225,000 paid to the Collector on August 15, 1947 (but unapplied to a tax deficiency until August 1948). The taxes in dispute of the "net deficiency" proposed for 1944 in the amount of $316,377.04 involved an overassessment of income tax of $102,816.60 and a deficiency in excess profits tax of $419,193.64. We are concerned with this asserted deficiency. A "net deficiency" is not a statutory deficiency. (Sec. 271.)

As there was no admitted liability for excess profits tax, the $225,000 constituted a payment in respect of a tax and one made on the estimated future determination which was to be settled under the Protest. Under the 1939 Code payment on open account in respect of a tax is not the payment of a tax and is not assessable. It would follow that, contrary to the court's decision, the Commissioner, in the absence of a Code Sec. 272 (d) waiver giving the Commissioner authority to assess and collect the $225,000 as a tax, could not legally make an assessment of tax.

The Court below erroneously construed the payment of $225,000 to be a *deficiency* in excess profits tax for 1944. (Resp. Br. 12 defining Sec. 271.) Petitioner's letter of August 14, 1947 (Appendix, infra, p. 18a) said it was paying the $225,000 on account (and against) the "net deficiency" of $316,377.04. No place in the 1939 code is there a provision covering a "net deficiency." A "net deficiency" is not a tax and is not assessable as such. This, moreover, makes it doubly clear that the $225,000 was what it was intended to be, the payment of an estimated amount on the 1944 disputed account. It eventually became part of the settled

deficiency of $308,493.20, but was not a "deficiency" when paid on August 14, 1947. (Resp. Br. 9)

In *Dubuque Packing Company* v. *U. S.*, 126 F. Supp. 796, aff'd 233 F.2nd 453 (8 Cir.), the lower court at 799 said:

> "It is evident from the cases that not every transfer of money by a taxpayer to a Federal tax authority will constitute a 'payment' under the laws relating to Internal Revenue. The question here presented is as to the status of a transfer of money to a Federal tax authority as a 'payment' within the statute of limitation contained in Section 322(b)(1). As heretofore noted, a 'return' or 'payment' will start the statute running. To do so the return must define the tax obligation or give sufficient information to define the tax obligation. It would seem that in construing the provisions of Section 322(b)(1) in connection with a 'payment' the same policy should be recognized and the same reasoning used as is recognized and used in construing the provisions of that Section in connection with a 'return'. In the case of a proper tax return, the return itself defines the tax obligation. However, in the case of a money transfer the transfer itself does not define the tax obligation. Hence some further act is necessary. A money transfer to a Federal tax authority (*regardless of the original reason for the transfer*) should start the statute of limitation running on the date that the *tax obligation becomes defined*. On this date the transfer becomes a 'payment' because from this day forward the taxpayer has a fair opportunity to determine whether he has a claim for refund. * * * This is also the holding in the case of *Thomas* v. *Mercantile Nat. Bank*, 5 Cir., 1953, 204 F. 2d 943. In that case the Court said, 204 F. 2d at page 944:
>
> > 'It would be illogical to hold * * * that the statute of limitation began to run against a claim for refund before the deficiency itself came into existence and *before the fact that there was an overpayment, and its or the amount thereof, became ascertainable.*" (Emphasis supplied)

The Agent had determined the *amount* of the *proposed* deficiency in excess profits tax of $419,193.64. The Commissioner had not determined there was a deficiency under Sec. 272(a)(1) of the Code. The deficiency agreed to by waiver signed by taxpayer on April 22, 1948, accepted for the Commissioner on April 27, 1948 was $308,493.20. The *net deficiency* in tax for 1944 was reduced to $249,576.01 from $316,377.04.

The case of *Leavyt Corp.* v. *Commissioner* (2 Cir.) cited by respondent (Br. 8) also favors petitioner's position for the reason that its letter of August 14, 1947 recited that it was the intention to pay the $225,000 *on account* and that sum was an estimate of what it might have to pay of the *net deficiency* proposed, amounting to $316,377.04 which was adjusted to $249,576.01. Under *Leavyt* there would have had to be an agreement between the taxpayer and the Commissioner to have assessed the $225,000 as an asserted tax. There was no agreement for assessment for 1944 or 1945. Neither was the Commissioner under a duty to accept the remittance as a payment of tax in full or *pro tanto*, because of the extended dispute over the liability and amount of the debt. The Commissioner, by authority of the documents (See Appendix) had no authority to assess a tax on the estimated payments on account for either 1944 or 1945. He did not do so for 1945. The 1944 assessment prior to final determination of liability or tax debt cannot be logically or legally justified or explained. It apparently was an administrative "bloomer," as there was likewise an expected deficiency for 1945. Petitioner so admitted. (Appen. p. 18-a).

For sake of clarification, petitioner presents in the Appendix hereto, the documents, reproduced in full, which the court below analyzed and interpreted in making its findings and conclusions of law on the question that petitioner had thereby waived its right to a final notice of

deficiency prior to April 22, 1948, as to the $225,000. The documents are listed and described as follows:

Appendix

Petitioner's letter of August 14, 1947, enclosing four (4) checks received by Collector of Internal Revenue, Chicago, on August 15, 1947. (Infra p. 18-a)

Receipt of Revenue Agent's Report signed by petitioner and dated August 14, 1947, received by the Internal Revenue Agent in Charge, Chicago, on August 20, 1947, together with a copy of the letter to Collector dated August 14, 1947, and Protest of August 19, 1947. (Infra, pp. 16-a—19-a)

Protest dated August 19, 1947, received by the Revenue Agent in Charge, Chicago, on August 20, 1947. (Infra, 19-a)

The findings of the court below contain reference to and quotations from all of said documents. Mere quotations from such documents contained in the findings and opinion of the lower court emasculate the true meaning of these communications and weaken petitioner's position in this case by asserting conclusions of law as facts. This Court is respectfully urged to carefully read the documents in detail as listed above.

Petititoner is willing to admit that these communications to the Collector and Agent in Charge expressed the hope that its tax liability for the years 1941, 1942, 1943, 1944 and 1945 would be settled as a result of its Protest for 1942, 1943 and 1944. (Appendix, infra, p. 19-a.) The Protest directly affected 1942, 1943 and 1944, although the remittances made to the Collector were applicable to 1944 and 1945. The outcome of the tax liability for 1945 was related to the controversy over the prior years as was stated in letter to the Collector.

The remittance for 1945 of $150,000 mentioned in the same letter to the Collector was intended by petitioner to be construed by the government in the same manner as for 1944. Prior to the payments for 1944 and 1945, petitioner had declined to sign Form 874, a Sec. 272(d) waiver of the restrictions on assessment and collection of tax under Sec. 272(a)(1) in response to the Agent's letter of July 23, 1947. (Pet. 8-a, Br. 4.) On August 14th petitioner told the Collector that it was filing its Protest, enclosing the four checks as payments on account for tax expected to be determined in the future as deficiencies, with interest to date with the intent to stop further interest, as it then thought it could do, without signing a Sec. 272(d) waiver. Petitioner admits it was in error on the interest stoppage in point of time. After assessing the $225,000 for 1944 on October 10, 1947, without knowledge to petitioner until April 19, 1948 when the interest of $33,750 for 1944 was reduced by $1125.00, petitioner and the Commissioner, under date of December 16, 1947 agreed by consent (Form 872) to extend the statute on assessment and collection of 1944 taxes until December 31, 1948. After the contest under the Profest was settled, petitioner was asked to and did sign a Form 874, Section 272(d) waiver of the provisions of Sec. 272(a)(1) in the amount of $308,699.83, transmuted to $308,493.20, regardless of the prior $225,000 previously assessed, which in August 1948 was applied to make out a government bookkeeping assessment entry of $83,493.20. These are facts set forth in the findings of the lower court.

If these admitted facts do not show petitioner to have clearly expressed its intention to have the deposit with the Collector of $225,000 on August 14, 1947 put to its credit pending the outcome of its Protest, which, when it was filed, was unpredictable as to the future liability determinable,

then petitioner is at a loss to further explain the true situation. In August 1947, petitioner, in effect said to the representatives of the Commissioner: "We will not sign away our rights under Sec. 272(a) until the controversy under the Protest is ended to our satisfaction." On April 22, 1948, petitioner signed the government form submitted, which provided, as follows:

> "Pursuant to the provisions of Section 272(d) of the Internal Revenue Code and or the corresponding provisions of prior internal revenue laws, the restrictions provided in Section 272(a) of the Internal Revenue Code and or the corresponding provisions of prior internal revenue laws as amended are hereby waived and consent is given to the assessment and collection of the following deficiency or deficiencies in tax: . . ."

The respective deficiencies for 1941, 1942, 1943, and 1944 were thereupon listed, below which were given the amount of the overassessments of tax (income tax and excess profits tax, respectively for 1944 and 1941. When the form was received by the Agent, the controversy was formally closed.

The initial irregular step in the whole procedure was the premature, invalid assessment of the remittance of $225,000 on October 10, 1947, and as is shown, the Commissioner thereafter acted as though the remittance had not been assessed, indicating that there was no justification for the assessment in the first place. Petitioner, contrary to what the court below said in its opinion (Pet. 5-a, 6-a), did not state or otherwise indicate that it did not care to contest the remittance of $225,000 as a liability or debt for taxes, but rather conveyed its intentions as above outlined.

Whether or not the sum remitted remained in the Collector's Suspense Account would not change the effect of petitioner's intentions. Under the 1939 code it was illegal

to impose a tax by assessment where a remittance is one in respect of a tax, unless and until a Section 272(d) waiver was executed by a taxpayer. Cf. *Thomas* v. *Mercantile National Bank at Dallas*, supra. Under the circumstances, the $225,000, with interest of $32,625, assessed on October 10, 1947, may be honored herein as a constructive assessment on August 13, 1948 when it was used to reduce the deficiency which came into existence by agreement of April 27, 1948. The $1125 interest refunded should be added.

In Conclusion

In the light of the foregoing, petitioner believes that the petition should be granted, and further, that petitioner would, upon the record, be entitled to summary judgment, reversing the lower court.

Respectfully submitted,

SPAULDING GLASS
135 South La Salle Street
Chicago 3, Illinois
Attorney for Petitioner

DX3

Form 1291
TREASURY DEPARTMENT
Internal Revenue Service
(Revised July 1943)

General Outdoor Advertising Co., Inc.

RECEIPT OF REVENUE AGENT'S REPORT

Please sign and return immediately

OFFICE OF INTERNAL REVENUE AGENT IN CHARGE

RECEIVED
AUG. 20, 1947
INT. REV. AGENT IN CHARGE
CHICAGO, ILLINOIS

City and State Chicago 7, Illinois
Date August 14, 1947

Receipt is hereby acknowledged of your letter dated July 23, 1947 enclosing report prepared by Internal Revenue Agent J. M. Quinlivan covering the taxable year(s) 1941, 1942, 1943 and 1944, showing a net deficiency of $284,713.34

The position of the undersigned with respect to the disposition of the findings disclosed by the report is indicated by a check mark:

1. REVENUE AGENT'S FINDINGS ARE AGREED TO ..... ☐

   (*a*) Signed Agreement Form 874 is enclosed herewith ..... ☐

   (*b*) Signed Agreement Form 874 has already been forwarded to your office ..... ☐

   (*c*) Payment of any deficiency in tax indicated above has already been made to Collector of Internal Revenue... (in part—not protested) ☒

   (*d*) Payment of any deficiency in tax indicated above will be made to the Collector of Internal Revenue upon receipt of notice and demand, and no objection will be made to the immediate assessment of the tax ..... ☐

2. REVENUE AGENT'S FINDINGS ARE NOT AGREED TO .... ☒
3. PROTEST WILL BE FILED WITHIN THE ALLOTTED TIME.. ☒
4. I DO NOT INTEND TO PROTEST THESE FINDINGS..... ☐

TAXPAYER: General Outdoor Advertising Co., Inc.

By .....
Treasurer

NOTE—If taxpayer is a corporation, the corporate name should be typed and signature should be by duly authorized officer of such corporation.

U. S. GOVERNMENT PRINTING OFFICE 16—84538-2

General Outdoor Advertising Co.

GENERAL OFFICE
HARRISON & LOOMIS STREETS
CHICAGO

August 14, 1947

Collector of Internal Revenue
First Illinois District
Chicago, Illinois

Dear Sir:

We have been advised of a proposed deficiency in excess profits tax for the taxable year 1944 in the sum of $419,193.64 and an over assessment of income tax for the same year in the amount of $102,816.60. Part of the net tax will be made the subject of a Protest to be filed with the agent in charge.

It is our purpose hereby to stop the further running of interest on the net tax deficiency for 1944 by making a payment on account of so many dollars in principal of tax and so many dollars of interest on such tax. Therefore, find enclosed herewith a check payable to your order in the sum of $225,000.00 to apply on the tax principal and another check payable to your order for $33,750.00 to apply on interest accrued on the tax deficiency for this year.

By reason of adjustments effective with the years 1942, -43, -44, a deficiency in tax will occur in 1945, and an amended return for 1945 is in the course of preparation and will be submitted to you at an early date. A tax deficiency for 1945 of approximately $150,000.00 at least is estimated. Accordingly, please find enclosed herewith another check in your favor to cover the expected tax deficiency for 1945 of $150,000.00 together with interest in the amount of $13,500.00 also covered by separate check payable to your order.

Yours very truly,

s/ J. O. Okerbloom
Treasurer

J.O.Okerbloom:h
Enclosures

PX21

RECEIVED
AUG. 20, 1947
INT. REV. AGENT IN CHARGE
CHICAGO, ILLINOIS

PROTEST

August 19, 1947

Internal Revenue Agent in Charge
105 West Adams Street
Chicago, Illinois

In re: General Outdoor Advertising Company, Inc. (New Jersey), 515 South Loomis Street, Chicago, Illinois,

Taxable Years 1941, 1942, 1943 and 1944

Dear Sir:

The undersigned taxpayer hereby protests in part the proposed adjustment in tax liability of which it was notified by your letter of July 23, 1947, transmitting report of Internal Revenue Agent, J. M. Quinlivan, dated May 26, 1947.

Exception is taken by the taxpayer to the following adjustments made in the agent's report:

(1) The agent failed to allow as a deduction for each of the years 1942, 1943 and 1944, respectively, the sums of $3,448.05, $3,973.50 and $4,498.45, which are Pennsylvania State Franchise tax, deductible in the year of liability. The tax accrues for payment on March 15 of each year following year of liability. It is believed that the agent merely overlooked these items in the final windup of his report. The figures can be supported and correction should be made.

(2) In determining equity invested capital for excess profits tax purposes, the agent erred in computing the amount of distributions made prior to the current taxable year (in each instance) not out of accumulated

earnings and profits. The agent refers to this issue on page 4 of his report and taxpayer's position is outlined in letter dated May 21, 1947, prepared and submitted to you by its attorney, Mr. Glass. Such letter may be referred to by you as taxpayer's brief in support of this item.

A hearing before the Conference Section of your office is hereby requested and you are asked to notify its attorney, Spaulding F. Glass, c o Lord, Bissell & Kadyk, 135 South LaSalle Street, Chicago 3, Illinois of the time for such hearing.

GENERAL OUTDOOR ADVERTISING COMPANY, INC. (NEW JERSEY)

By .....
Treasurer